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In the Supreme Court of the United States

OCTOBER TERM, 1974

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,
PETITIONERS

v.

VIRGINIA STATE BAR AND
FAIRFAX COUNTY BAR ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether a minimum fixed fee schedule promulgated by a county bar association is exempt from the Sherman Act's prohibition against price fixing on the ground that the restraint on competition is among the members of a "learned profession."

2. Whether interstate commerce is affected by collectively-fixed fees for attorneys' services in connection with the purchase of real estate in Northern Virginia.

3. Whether the Virginia State Bar is exempt from the Sherman Act for its role in the establishment and enforcement of minimum fee schedules, under the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341.

INTEREST OF THE UNITED STATES

Responding to evidence that prices for personal services were increasing more rapidly than the rate of inflation in the rest of the economy, more than four years ago the United States initiated a concerted program of antitrust enforcement directed at restraints of trade occurring in the "commercial" aspects of various professions (including attorneys) and other providers of personal services.[1] This program has included widely-disseminated statements of the Antitrust Division's policies, followed by litigation challenging particular anticompetitive practices of various professions. The government has challenged, as illegal *per se*, so-called "ethical" standards by professional associations of engineers, architects, accountants and realtors that prevent price competition in the charges for services by members of these professions.[2] In

[1] See, *e.g.*, McLaren, *Antitrust—The Year Past and The Year Ahead*, 1970 N.Y. State Bar Ass'n Antitrust L. Symp. 15, 23; McLaren, *Interview*, 39 Antitrust L.J. 368, 377 (1970); Hearings before the Subcommittee on Representation of Citizens Interests of the Senate Committee on the Judiciary, on Legal Fees, 93d Cong., 1st Sess., pt. I, pp. 164–185.

[2] *E.g.*, *United States* v. *Prince Georges County Bd. of Realtors*, Civ. No. 21545 (D.Md.), terminated by consent decree on December 28, 1970; *United States* v. *American Soc'y of Civil Eng'rs*, Civ. No. 72 C 1776 (S.D.N.Y.), terminated by consent decree on June 1, 1972; *United States* v. *American Institute of Architects*, Civ. No. 992–72 (D.D.C.), terminated by consent

May, 1974, the government filed a similar action challenging a bar association's minimum fee schedule.[3]

Despite the government's enforcement efforts,[4] bar association minimum fee schedules, a fairly recent development,[5] are still widespread; they have been used by as many as 34 state, and about 750 local, bar organizations[6] (Pet. App. A–20). The decision of this Court on the legality of such schedules under Section 1 of the Sherman Act will not only have great impact upon the legal profession but also is likely significantly to affect the use of such methods of fee-fixing by organizations in other professions.

decree on June 19, 1972; *United States* v. *American Institute of Certified Public Accountants, Inc.*, Civ. No. 1091–72 (D.D.C.), terminated by consent decree on July 6, 1972; *United States* v. *National Soc'y of Professional Eng'rs*, Civ. No. 2412–72 (D.D.C.), decided in the government's favor on December 19, 1974 (bar against competitive bidding). The decision is appended to this brief (App., *infra*).

[3] *United States* v. *Oregon State Bar*, No. 74–362 (D. Ore.), filed May 9, 1974. On defendant's motion for summary judgment, raising the "learned profession" and "state action" claims, discussed *infra*, pp. 21–30, 34–48, but not the "commerce" issue (see pp. 31–34, *infra*). the district court held on November 22, 1974. that neither of these exemptions applies. The decision is appended to petitioners' brief ("Pet. Br. App.").

[4] The American Bar Association, which in 1961 endorsed minimum fee schedules by concluding that the habitual charging of fees less than those established by such a schedule may be evidence of unethical conduct (Opinion No. 302, Committee on Professional Ethics and Grievances), stated in 1970 that "[m]ere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent evidence of misconduct, afford a basis for disciplinary action" (Opinion No. 323, Committee on Ethics and Professional Responsibility).

[5] See Branca, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Exemption That Doesn't Exist*, 3 U.C.L.A.—Alaska L. Rev. 207, 208 (1974).

[6] Branca, *supra*, 3 U.C.L.A.—Alaska L. Rev. at 208.

The interest of the United States in this case is underscored by the President's recent announcement of his economic program, in which he referred particularly to the need for enforcement of the antitrust laws with respect to "noncompetitive professional fee schedules and real estate settlement fees * * *." 120 Cong. Rec. H10120, H10121 (daily ed., October 8, 1974).

STATEMENT

Petitioners filed a class action against respondents, the Fairfax County Bar Association ("Association") and the Virginia State Bar ("State Bar"), alleging that the Association's adoption and use of a minimum fixed fee schedule, declared by the State Bar to be an enforceable ethical standard, constituted price fixing and restraint of trade and commerce in violation of Section 1 of the Sherman Act.

Petitioners claimed to represent a class consisting of all persons who, like petitioners, had purchased houses in Reston, Fairfax County, Virginia, during the four years preceding the filing of the complaint, and who had been charged title examination fees by attorneys as prescribed in the Association's schedule. Petitioners sought damages, a declaratory judgment and an injunction, but the district court severed the issue of damages and held a trial as to liability.

A. THE DISTRICT COURT'S FINDINGS AND DECISION

In ruling for petitioners, the district court made the following findings of fact and conclusions of law (Pet. App. A; 355 F. Supp. 491).

In the fall of 1971, petitioners, who then resided in Arlington, Virginia, contracted to purchase a house in Reston, Virginia. In searching for an attorney to represent them in the legal aspects of the transaction, petitioners were advised that they would be charged for title examination services in accordance with the minimum fee schedule of the Association.

In 1969, the Virginia State Bar Association had published a "consensus recommendation * * * as to fees which should be assessed * * * for the legal services indicated" (Pet. App. A–9). The recommended fees reflected in most cases "a general scaling up of fees" recommended in a similar schedule published by the State Bar in 1962 (A. 25; see A. 19–23). The recommendation suggested that title examination fees should be 1 percent of the first $50,000 of the loan amount or purchase price plus ½ percent of the amount between $50,000 and $250,000 (A. 26). (*Ibid.*)

Shortly after the State Bar's promulgation of the new fee schedule, the Fairfax County Bar Association (and the bar associations in Alexandria, Arlington and Loudoun Counties) adopted a virtually identical minimum fee schedule which followed the State Bar schedule with immaterial variations (A. 37–43).[1] In adopting the minimum fees outlined by the State Bar, the Association increased both flat dollar fees for various legal services (compare A. 34–36 with

[1] Originally named as defendants and co-conspirators, the Arlington County Bar Association and the Alexandria Bar Association agreed to a consent judgment requiring them to cancel their minimum fee schedules (Pet. App. A–2, n. 1).

A. 40–43) and percentage rates for services[5] over the levels established in the similar schedule adopted by the Association following the 1962 minimum fee report of the State Bar.

The Canons of Ethics in effect until 1971, and the current Code of Professional Responsibility promulgated by the Supreme Court of Virginia, both provide that, in determining charges for title examination and certification, it is proper for a lawyer to consider a suggested fee schedule. The Canons also provided, however, that "no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee" (Pet. App. A–9). Nevertheless, the State Bar has issued two opinions (Nos. 98 and 170) which, the district found, "in effect say that it is unethical habitually to charge fees below those suggested in a minimum fee schedule" (*id.* at A–5).

The district court held that minimum fee schedules constitute a form of price fixing which is indistinguishable from fixed sales prices and which is illegal *per se*. It ruled that they cannot be justified as a guide to setting charges, or to assure an adequate income for research, development and continued education, and that they are often likely to result in charges unrelated to the worth of the services performed (*id.* at A–3—A–5).

[5] For example, the 1969 schedule increased the minimum fee for a title examination from 0.75 percent to one percent for the first $20,000 of the sale price, and from 0.5 percent to one percent for the portion of the selling price between $20,000 and $50,000 (A. 34, 40).

The court concluded that the challenged activity substantially and directly affected interstate commerce because it found that: a significant portion of funds used for purchasing homes in Fairfax County came from outside the state of Virginia; almost all lenders require a new title search and title insurance; a large percentage of Fairfax County residents work outside Virginia; and significant amounts of real estate loans in the county are guaranteed by the federal Veterans Administration and Department of Housing and Urban Development (*id.* at A–4).

The court held that there was no "learned profession" exemption from the Sherman Act for professional services performed by lawyers pursuant to a minimum fee schedule. On the contrary, it concluded that "[c]ertainly, fee setting is the least 'learned' part of the profession" (*id.* at A–5).

Finally, the court held that the State Bar acts as an administrative state agency of the Supreme Court of Virginia (Va. Code Ann., Sec. 54–59 (1972 Repl. Vol.)). Since the district court found that the activities of the State Bar were state action, and that it never had disciplined attorneys for undercutting fixed minimum fee schedules, the court held that it was not liable under the antitrust laws in view of *Parker* v. *Brown*, 317 U.S. 341 (Pet. App. A–6). In contrast, because the Association is a voluntary private organization whose implementation of suggested minimum fee schedules does not depend upon action by the legislature or the Virginia Supreme Court, the court held that it is not exempt from the antitrust laws.

The court enjoined the Association from maintaining fixed fee schedules and ordered a further hearing on versed (Pet. App. B; 497 F. 2d 1).

B. THE COURT OF APPEALS DECISION

The court of appeals, Judge Craven dissenting, reversed (Pet. App. B; 497 F. 2d 1).

1. The court held that the State Bar, as an administrative agency of Virginia's Supreme Court of Appeals, fell within the governmental action exemption to the Sherman Act defined by *Parker v. Brown, supra*. The court ruled, however, that the *Parker* exemption did not extend to the Association, a voluntary non-governmental organization (Pet. App. B–12).

2. Although it found clear from the record that the minimum fee schedule and the enforcement mechanism supporting it substantially restrain competition among attorneys practicing in Fairfax County (*id.* at B–13), the court concluded, citing *Federal Baseball Club of Baltimore, Inc.* v. *National League*, 259 U.S. 200, and *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, that such collective restraints are lawful because the Sherman Act reaches only restraints of "trade or commerce," and the practice of law is a "learned profession," not trade or commerce.

3. Although the court acknowledged that the "learned profession" exemption did not apply insofar as the "fee schedule restrains those engaged in the financing and insuring of home mortgages by inflating a component part of the cost of securing housing" (Pet. App. B–15), it ruled that the schedules did

not have a direct and substantial effect upon interstate commerce. It held irrelevant the fact that Fairfax County residents work outside the state, and concluded that the adverse effects that the district court found the schedules to have on out-of-state lenders and guarantors were merely incidental to a general local activity—the practice of law—which the Association regulated (*id.* at B–15—B–18).

4. Finally, the court held that to apply the Sherman Act to minimum fixed fee schedules would amount to judicial legislation; would cast doubt upon the validity of bar admission standards, prohibitions upon advertising and other restrictions upon the practice of law; and would threaten retroactive application of a punitive statute in a manner that would create confusion in the legal profession (*id.* at B–19).

5. Judge Craven, dissenting, concluded that there is no exemption from the Sherman Act for "learned professions" (*id.* at B–23—B–24), and that the activities of the Association with respect to the fee schedule sufficiently affected commerce to be within the scope of the Sherman Act (*id.* at B–21—B–23). He would have affirmed the dismissal of the State Bar, however, on the ground that its involvement in promulgating and maintaining the fee schedules was too insubstantial to render it liable for violation of the Act (*id.* at B–21).

SUMMARY OF ARGUMENT

1. The promulgation and concerted use of minimum fee schedules by lawyers is inherently anticompetitive, a form of price fixing which, if undertaken in almost any other business, would be a *per se* viola-

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tion of Section 1 of the Sherman Act. Though cast in the form of an "ethical" standard of the legal profession, such schedules involve the most commercial aspect of law practice, are intended primarily to increase lawyers' incomes, and inevitably result in higher prices to consumers and non-use of legal services when they are needed. Accordingly, the use of such schedules is contrary to the basic purposes of the Sherman Act, and does not serve any significant nonpecuniary, ethical interest of the legal profession.

2. The court of appeals erred in concluding that the Sherman Act does not apply to competitive restraints by members of a "learned profession." Neither the language of the Act nor its history supports any such exemption, and implied exceptions to the Sherman Act are disfavored. Moreover, the application of the Sherman Act to fee fixing by lawyers does not involve any clash of statutory or public policies warranting the Court to imply such an exemption.

The court of appeals misread certain dicta in this Court's opinions concerning other issues as recognizing a "learned profession" exemption, although the Court has in later decisions expressly treated that question as still open. In any event, the decisions that originally raised the question whether "learned professions" are covered by the Sherman Act rested upon narrow views of the power of Congress to regulate "commerce" which this Court has long since rejected. If there are other reasons for such an exemption, they involve matters of legislative policy which are not for the courts, but the legislature.

3. In reversing the judgment against the Association the court of appeals also erred in holding that the challenged restraints on price competition by lawyers in Fairfax County do not affect interstate commerce. Here, too, the court applied an outdated conception of the commerce power, since the Sherman Act extends to the full reach of Congress' power to regulate commerce. The record in this case established a sufficiently substantial impact on interstate commerce to bring the challenged price-fixing within the scope of the Sherman Act.

4. The court of appeals erred in concluding that the State Bar was immune from liability under the Sherman Act on the ground that its role in the challenged fee fixing constituted "state action" and it was hence exempt under *Parker* v. *Brown,* 317 U.S. 341. The State Bar's promulgation and endorsement of minimum fee schedules satisfies none of the three bases for establishing state action that *Parker* announced.

First, the schedules do not derive their authority and efficacy from the legislative command of the state (*id.* at 350), since the Virginia legislature has not specifically authorized or required the use of such schedules. Second, the State Bar's activities concerning the schedules did not constitute actions of the state or its officers or agents directed by its legislature (*id.* at 350–351), since the State Bar consists of all lawyers practicing in Virginia and is not a state agency.

Finally, the schedules have never been adopted, approved or enforced by the state or a state agency

(*id.* at 352). The Virginia Supreme Court is the only arguably relevant state agency. That court's approval of reference to "customary charges" or "suggested" fee schedules as being among the several factors to be considered by lawyers in setting fees does not constitute the requisite state approval of the use of minimum fee schedules. The court of appeals erred in concluding that the state court's failure to disapprove such schedules constituted such approval.

ARGUMENT

I. INTRODUCTION—THE LEGAL PROFESSION AND MINIMUM FEE SCHEDULES

A. THE LEGAL PROFESSION

In "the distribution of legal assistance, [which,] like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise" (*Fuller* v. *Oregon*, 417 U.S. 40, 53), the lawyer can be described as "'a self-employed business man.'" Patterson & Cheatham, *The Profession of Law* 263–264 (1971). The practice of law now constitutes a significant segment of the national economy. In 1973, the provision of legal services accounted for $9.3 billion of total national income. *Statistical Abstract of the United States* 371, 752 (1974). Of some 325,000 lawyers in the United States in 1970, more than 236,000 were in private practice. *Id.* at 158.[9]

[9] According to one estimate, in 1970 about 73 percent of all lawyers were in private practice, twelve percent privately employed, and fourteen percent in government service, of which three percent were in the judicial branch. York & Hale, *Too Many Lawyers? The Legal Services Industry: Its Structure and Outlook*, 26 J. Leg. Educ. 1, 7–10 (1973). In Virginia there were 6,401 lawyers in 1970, of whom 4,354 were in private practice. *Statistical Abstract of the United States* 158 (1974).

No longer do all lawyers operate as independent enterpreneurs of legal services. Numerous law firms are now large organizations with more than 100 lawyers, often having offices in several cities—perhaps several countries. Cf., *e.g.* Smigel, *The Wall Street Lawyer* 206–207 (1964). In Virginia and many jurisdictions, moreover, law firms can and do now operate as corporations.[10]

The development of the modern large law firm has paralleled and been closely interrelated with the development of business generally. Cf., *e.g.*, Smigel, *supra*, at 4–8; Goulden, *The Superlawyers* (1971). The connection between commercial activity and the legal profession is graphically reflected by figures showing the distribution of attorneys in the United States. As one recent study of the legal profession observed:

> The demand for legal services today is mainly a function of institutional economic activity. It is dependent upon the number of corporations in the market, the volume of retail sales, and the number and size of retail and service organizations. Although there are certain forms of demand for legal services which have an obvious relationship to the population—such as personal-injury litigation or will pro-

[10] See, *e.g.*, Cal. Bus. & Prof. Code Ann., Sec. 6160, *et seq.* (Supp.); Md. Code Ann., Sec. 23–441, *et seq.*; N.Y. Bus. Corp. L. Ann., Sec. 1501, *et seq.* (Supp); Pa. Code Ann., Sec. 15–12601, *et seq.*; Va. Code Ann., Sec. 13.1–542, *et seq.*, 54–42.2–42.3 (Supp.).

> bation—legal services are increasingly demanded by institutions and those who must deal with them. [York & Hale, *Too Many Lawyers? The Legal Services Industry: Its Structure and Outlook,* 26 J. Leg. Educ. 1, 13 (1973).]

The study also concluded that "economic activity rather than population is the best indicator of demand for, and hence supply of lawyers" (*id.* at 10), and that about half of the country's lawyers are located in five industrial states where commerce is most intense (New York, California, Illinois, Texas and Ohio) and at the seat of the federal government in the District of Columbia. *Ibid.* Although no detailed data are available, it has been estimated that about 40 percent of all private lawyers' income derives from serving commercial interests, the other 60 percent deriving from services involving individuals. See Mayer, *The Lawyers* 19–20 (1966).

B. THE NATURE OF FEE SETTING AND THE ROLE OF MINIMUM FEE SCHEDULES

Whatever once may have been thought about lawyers' fees, "[t]here is nothing left of the pose that the lawyer receives only an honorarium slipped into the hind pocket of his gown out of the gratitude of the client." Patterson & Cheatham, *supra,* at 263–264. Fee setting is not only "the least 'learned' part of the profession" (Pet. App. A–5), as the district court aptly observed, it is the most commercial aspect of law practice. Moreover, the setting of fees involves "an inescapable conflict of interest between lawyer and client" (Patterson & Cheatham, *supra,* at 269), so that it is

an area less satisfactorily left to regulation by ethical considerations primarily implemented by the person facing conflicting pressures.

Although American legal history has been marked by sporadic local efforts at collective fee setting since the Republic's earliest days,[11] the practice more generally prevailing until recent decades was reflected in Justice Holmes' opinion in *Hyde* v. *Moxie Nerve Food Co.,* 160 Mass. 559, 560–561, 36 N.E. 585, 586):

> Free competition prevails at the bar as well as elsewhere, and different men command different rates of compensation—some of them much in excess of any official salaries. Thus far the experience of the Commonwealth has been that this freedom has not operated to keep citizens from the courts, or to shut the poor off from justice.

Beginning in the 1950's, however, minimum fee schedules were widely adopted by unified bars or bar associations at the state and local levels. Branca, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Exemption that Doesn't Exist,* 3 U.C.L.A.-Alaska L. Rev. 207, 208 (1974). Minimum fee schedules have been adopted by bar organizations at the state-wide level in 34 states and the District of Columbia and by more than 700 local bar organizations. *Id.* at 208. Moreover, since many of these states now have unified or integrated

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[11] In 1796, members of the Boston Bar adopted schedules of charges by which lawyers bound themselves "not to receive less fees or compensation than therein expressed." II Chroust, *The Rise of the Legal Profession in America* 233, n. 36 (1965).

bars,[12] with whose requirements a lawyer-member must comply, the impact of such schedules has been enhanced. Indeed, the vast majority of lawyers apparently make some use of minimum fee schedules. Arnould & Corley, *Fee Schedules Should Be Abolished,* 57 A.B.A.J. 655, 660 (1971).

More than 35 years ago, in an effort to improve the economic condition of the legal profession, the American Bar Association concluded that the purpose of minimum fee schedules was "[e]ssentially * * * to discourage competitive price-cutting and to check the practice some laymen have of shopping around among lawyers * * *." American Bar Ass'n, *The Economics of the Legal Profession* 153 (1938). A more recent study similarly concluded that the aim of minimum fee schedules is still "to prevent that 'shopping around' among lawyers which many regard as the reason why the legal profession has failed to keep pace with the doctors in income growth over the last generation." Mayer, *supra,* at 22. Not surprisingly, fee schedules appear to be used most heavily by low-income lawyers. Arnould & Corley, *supra,* 57 A.B.A.J. at 660.

Collective fee determination pits each client against the organized strength of the bar as a whole, and denies the client the right, enjoyed in other affairs, to choose among offerings of comparable quality on the basis of price. Moreover, collective fee setting

[12] See generally McKean, *The Integrated Bar* (1963); *Lathrop* v. *Donohue*, 367 U.S. 820. Integrated bars have already been established in 29 states, the District of Columbia and Puerto Rico; Arkansas has a partially-integrated bar (*1973–1974 American Bar Ass'n Directory* 143A–146A) and Montana is expected to have an integrated bar in 1975.

deprives both client and lawyer of the right to determine for themselves the compensation to be paid for personal services rendered,[13] and is directly inconsistent with the independence that has been the hallmark of the private practitioner in America.[14] As the district court observed (Pet. App. A–5):

> [T]here is a basic inconsistency between the lofty position that professional services, not commodities, are here involved and the position that a minimum fee schedule is proper. The former properly contemplates differences in abilities, worth and energies expended of those rendering the services. Such differences are made as meaningless by a minimum fee schedule as they would be by a maximum fee schedule.

The primary impact of minimum fee schedules is upon small businesses and middle income individuals,

[13] Cf. *In re Estate of Freeman*, 34 N.Y. 2d 1, 311 N.E. 2d 480, 355 N.Y.S. 2d 336, stating that, while a surrogate court's reference to a minimum fixed fee schedule in setting a fee award was not invalid under a state statute similar to the Sherman Act, the use of such schedules by lawyers to hinder fee competition may be unethical. 34 N.Y. 2d at 11, 311 N.E. 2d at 485, 355 N.Y.S. 2d at 342.

[14] One legal historian has written (I Chroust, *The Rise of the Legal Profession in America* xii–xiii (1965)): [A] learned profession such as the legal profession always presupposes individuals who are free to pursue a learned art unhampered by outside political influence. Only a free individual can strive for the greatest possible development and unfolding of all his moral and intellectual powers by way of an undeterred application of his chosen field of learning and the free exercise of his trained judgment. Anything which tends to weaken the independence of the lawyer as a 'private person' in the long run is destructive of the profession as a whole."

who only occasionally use legal services. Proponents of such fee schedules assert that they are most useful "in routine affairs that affect the individual: divorce, adoption, sale of a home, probating a smaller estate or routine appearance in court." Miller & Weil, *Let's Improve, Not Kill, Fee Schedules,* 58 A.B.A.J. 31, 32 (1972). Such schedules also typically cover transactions likely to be encountered by small businesses, such as creation and dissolution of partnerships and corporations, bill collection, minor litigation, foreclosure and bankruptcy. See Arnould & Corley, *supra,* 57 A.B.A.J. at 657.

By contrast, legal services for large enterprises and persons of wealth tend to be unaffected by minimum fees, because the general level of fees to such individuals and enterprises is usually well above the scheduled minima. The poor, on the other hand, have access to various forms of publicly-financed or uncompensated, voluntary legal services. See generally Note, *A Critical Analysis of Bar Association Minimum Fee Schedules,* 85 Harv. L. Rev. 971 (1972); Christensen, *Lawyers for People of Moderate Means* 18–39 (1970).

Minimum fixed fee schedules have adverse economic consequences. In some cases, the minimum fee level will be higher than the level that would prevail if the fee were set by the free competitive interaction of supply and demand so as to reflect the true economic value of the services rendered. Although no evidence was presented to the district court in this case that the minimum fee schedule involved here "does permit the charging, by an attorney, of more than the services

are worth" (Pet. App. A–5), the court noted that such schedules may result in inflated fees not measured by "differences in abilities, worth and energies expended of those rendering the services" (*ibid.*).[15] In fact, the levels of minimum fee schedules strongly suggest that such schedules provide "unreasonable" fees that "cannot be justified by * * * economic conditions." Arnould & Corley, *supra,* 57 A.B.A.J. at 657, 658.

The impact of fee schedules, moreover, is not confined to transactions billed at the minimum level. The fixing of a minimum fee naturally tends to affect other charges because the scheduled minimum rate can be and often is used as a starting point for pricing of legal services—both those directly covered by the schedule but billed at above-minimum rates and those not covered by the schedule.

For many of the legal services significantly affected by minimum fee schedules, the demand is likely to be price-inelastic, in that the client must employ a lawyer. The instant case is a classic example, since in Virginia various aspects of real estate transactions must be handled by lawyers,[16] unlike other jurisdictions, such as the District of Columbia, where similar

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[15] This may occur, for example, where a lawyer is handling a large number of similar transactions and charges the same fee for work that is essentially repetitive, involving marginal costs far below the minimum fee level. Fixed fee schedules thus may tend to produce charges that are not related to the professional factors—skill, time and responsibility—that should form the basis for lawyers' fees.

[16] See Unauthorized Practice of Law Opinion No. 207, *Virginia State Bar—Opinions* 239 (1965 ed.).

services have customarily been supplied by title companies. In that situation, the consumer has no choice but to pay at least the price established by the fee schedule.

Not surprisingly, real estate closing costs in the Washington metropolitan area are substantially higher in Northern Virginia than in the District of Columbia, in part because lawyers' fees in Virginia were higher than title company charges in the District for comparable services. See *Washington Post*, January 9, 1972, p. A1; *id.*, January 10, 1972, p. A1; *id.*, January 11, 1972, p. A1; *id.*, January 12, 1972, p. A1.

In transactions involving discretionary use of legal services, the inevitable tendency of minimum fee schedules will be to lead some consumers to forego legal services that they need and would use if a lawyer charged, or had been free to charge, a lower fee. If each individual lawyer can determine his own fees, economic principles will operate as in other free markets, tending to force prices and the offering of legal services to levels better matched to the public's needs.[17]

[17] Under a regime of competitive fee-setting, each lawyer's offering of services is forced toward a level that equals the price that clients can be induced to pay. "No lawyer can demand much more than this price without losing clients to lawyers whose services are considered comparable and who are willing to accept no more than the normal profit already included in total cost." Note, *supra*, 85 Harv. L. Rev. at 976–977. Unrestrained individual fee-setting also tends to allocate limited resources to those lawyers who are most efficient in utilizing them. See *id.* at 977. See also Arnould & Corley, *supra;* Miller & Weil, *supra.*

Arguments for and against fixed fee schedules among English solicitors are analyzed in Zander, *Lawyers and the Public Interest: A Study in Restrictive Practices* 185–208 (1968).

II. THE PROHIBITIONS OF THE SHERMAN ACT APPLY TO RESTRAINTS OF TRADE AMONG MEMBERS OF "LEARNED PROFESSIONS"

In reversing the district court's judgment as to the Association, the court of appeals concluded that th prohibition of the Sherman Act against "[e]very * * * restraint of trade or commerce among the several States" does not apply to restraints upon the practice of a "learned profession" such as law (see, p. 21–30, supra). Insofar as that conclusion rests upon erroneous assumptions about the reach of the Sherman Act into the "trade or commerce" of the nation, we discuss it in point III. Here we show that such an exemption is without basis in the language, history, policy and past interpretations of the Act, and is not required to accommodate any special circumstances concerning the practice of law.

A. NEITHER THE LANGUAGE NOR LEGISLATIVE HISTORY OF THE SHERMAN ACT JUSTIFIES AN EXEMPTION FOR COMPETITIVE RESTRAINTS BY MEMBERS OF "LEARNED PROFESSIONS"

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations * * *." 15 U.S.C. 1. This comprehensive prohibition does not expressly exempt members of "learned professions," and such an exemption may not be lightly

implied. See, *e.g.*, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350–351; *California* v. *Federal Power Commission*, 369 U.S 482, 485.

As we show below (see n. 18, *infra*), nothing in the legislative history of the Sherman Act indicates that the phrase "trade or commerce" was not intended to cover all commercial restraints, no matter by whom imposed. Accordingly, the Act has been construed as applying to restraints affecting a variety of services unrelated to the production of goods. See, *e.g.*, *Radovich* v. *National Football League*, 352 U.S. 445 (professional football); *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485, 489–492 (real estate dealers); *American Medical Ass'n* v. *United States*, 317 U.S. 519 (medical care and hospitalization); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 435–437 (dry cleaners); *United States* v. *Utah Pharmaceutical Ass'n*, 201 F. Supp. 29, 35–36 (D. Utah), affirmed *per curiam*, 371 U.S. 24 (pharmacies).

If Congress had intended to exempt from the broad prohibitions of the Sherman Act price-fixing or other competitive restraints imposed by members of some undefined category of "learned professions," presumably that intent would have been reflected in the extensive legislative history of the Act. However, proponents of an exemption for the "learned professions" have proffered no such history, and we have found none.[18]

[18] The only relevant history we have found shows that it was thought unclear whether the original Sherman bill (S. 1, 51st Cong., 1st Sess.), which applied only to combinations preventing competition in "articles of growth, product or manufacture," would apply to "combinations * * * between bar associations and doctors for raising their prices or fees * * *." 21 Cong. Rec. 2726. Any doubts were presumably eliminated when the language of the bill was broadened to cover, as enacted, "[e]very contract, combination * * * or conspiracy, in restraint of trade or commerce * * *." 15 U.S.C. 1.

In *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, the Court held the insurance business not to be exempt from the Sherman Act, in the face of far more substantial evidence than exists here that Congress did not intend the Act to reach that business. See *id.* at 556–558, 574–577.

B. THIS COURT HAS NEVER RECOGNIZED A SHERMAN ACT EXEMPTION FOR MEMBERS OF "LEARNED PROFESSIONS"

The court of appeals based its ruling that the Sherman Act does not cover price-fixing by members of a "learned profession" upon dicta in this Court's decisions in *Federal Baseball Club of Baltimore, Inc.* v. *National League*, 259 U.S. 200, and *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643. In neither case, however, was that question before the Court. Justice Holmes' opinion in *Federal Baseball*, in holding that professional baseball was not "commerce" covered by the Sherman Act, stated broadly that "personal effort, not related to production, is not a subject of commerce." 259 U.S. at 209. The Court's decision rested, however, upon an approach to the Congressional power to regulate commerce that it has since rejected. The actual holding in *Federal Baseball*, characterized by this Court as an "aberration"

(*Flood* v. *Kuhn*, 407 U.S. 258, 282), has survived only by virtue of the doctrine of *stare decisis*. *Ibid.*[19]

Raladam did not even involve the Sherman Act. There the Court set aside a Federal Trade Commission order against the sellers of an obesity cure, under Section 5 of the Federal Trade Commission Act, because there was no evidence of the injury to competition required under Section 5 as originally enacted. In dictum the Court observed that while some doctors may have been misled by the seller's advertisements, they "follow a profession and not a trade" and were not in competition with the seller. 283 U.S. at 653.

Since *Federal Baseball* and *Raladam* this Court has made plain that neither case established an exemption for "learned professions," because it has in later cases treated that question as still an open one which it had no need to decide.[20]

The court of appeals also relied upon this Court's reference in *Atlantic Cleaners & Dyers, Inc.* v. *United States, supra,* 286 U.S. at 435–436,[21] to language in

[19] The Court's comment in *Federal Baseball* that "a firm of lawyers sending out a member to argue a case * * * does not engage in such commerce because the lawyer * * * goes to another State" (259 U.S. at 209) would have been superfluous if lawyers were exempt from the coverage of the Sherman Act by reason of being members of a "learned profession."

[20] Thus, the Court found it unnecessary to decide in *American Medical Ass'n* v. *United States*, 317 U.S. 519, 528, "whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act." and in *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485, 491–492, declined to "intimate an opinion" on whether the "professions" constitute "trade" under the Sherman Act.

[21] See also *United States* v. *National Ass'n of Real Estate Bds.*, *supra*, 339 U.S. at 490–491.

a decision by Justice Story in 1834, on circuit, in which he held that mackerel fishing was a "trade" within the meaning of the Coasting and Fishery Act of 1793, 1 Stat. 316. *The Nymph*, 18 Fed. Cas. (No. 10388) 506 (C.C. Me.). In an extended discussion concerning the varied meanings of the word "trade," Justice Story said in passing that "[w]herever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade." *Id.* at 507. That characterization of the meaning of "trade" in a 1793 statute, however, provides little meaningful guidance in applying to the realities of the 1970's the broad language of the Sherman Act of 1890.

In *Atlantic Cleaners*, moreover, the Court did not rely upon the reference in *The Nymph* to "learned professions," but rather applied Justice Story's "broad" interpretation of "trade" in holding that the business of cleaning, dyeing and renovating clothes constituted "trade or commerce" covered by Section 3 of the Sherman Act.

C. APPLICATION OF THE SHERMAN ACT TO THE COMMERCIAL ASPECTS OF LAW PRACTICE WILL SERVE THE PURPOSES OF THE SHERMAN ACT WITHOUT DISSERVING ANY IMPORTANT INTEREST UNDERLYING THE REGULATION OF THE PRACTICE OF LAW

The ultimate purpose of the Sherman Act is to protect the consumer through preservation of competition. See, *e.g.*, *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 4–5; *United States* v. *Topco Assocs., Inc.*,

405 U.S. 596, 610. Although an anti-competitive restraint in a business or profession may directly affect only the members of that group, as is the case with fixed minimum fee schedules, the ultimate economic injury is borne by the public at large in the form of higher costs, and unavailability of legal services. For this reason, the court of appeals' suggestion that collective price fixing by members of learned professions is consistent with the Sherman Act so long as it restrains only the business of other members of the profession, and not other commercial activities, is unsound (Pet. App. B–15).

Nor is the Sherman Act rendered inapplicable to commercial restraints within the learned professions because such restraints are assertedly motivated by a non-commercial purpose. Application of the antitrust laws does not depend upon the motives of those who restrain competition, but upon the economic effects of their conduct. As this Court stated in *United States* v. *National Ass'n of Real Estate Bds., supra,* 339 U.S. at 489:

> Price-fixing is *per se* an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve. That is the teaching of an unbroken line of decisions. [Accord, *United States* v. *Socony-Vacuum Oil Co.,* 310

> U.S. 150, 224–226, n. 59; *United States* v. *Trenton Potteries Co.,* 273 U.S. 392, 396–401.] [22]

In any event, as we have indicated (see pp. 16–20 *supra*), a primary purpose of minimum fee schedules is to increase lawyers' incomes, and an inevitable consequence is either to prevent consumers from using legal services or to require that they pay more for the legal services they use.

The claim that anticompetitive policies are being enforced only to eliminate improper practices and raise ethical standards in an industry is no novelty in antitrust litigation; too frequently, however, the "unethical" conduct in question turns out to be the vigorous competition that the antitrust laws are designed to stimulate and protect. See, *e.g., Sugar Institute, Inc.* v. *United States,* 297 U.S. 553, 598–602;

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[22] The result in *Marjorie Webster Jr. College, Inc.* v. *Middle States Ass'n of Colleges & Secondary Schools, Inc.,* 432 F. 2d 650 (C.A.D.C.), certiorari denied, 400 U.S. 965, is not to the contrary, although we disagree with the court's rationale. That case did not involve a *per se* offense like price-fixing. It held that a college accreditation association's refusal to accredit any proprietary institution did not violate Section 1 of the Sherman Act. Drawing a line between commercial and "non-commercial aspects of the liberal arts and the learned professions" (432 F. 2d at 654), the court found that the challenged restriction was motivated solely by educational concerns, not by a purpose to effect the commercial aspects of education, and thus was permissible as an incidental restraint of an essentially noncommercial activity. The court declared, however, that restrictions with commercial motivations would be subject to antitrust policy. 432 F. 2d at 654–655.

We question the soundness of the "commercial motivation" test, in view of this Court's decisions in *Real Estate* and other cases. Nevertheless, even under *Marjorie Webster*, bar association fixed minimum fee schedules must be viewed as essentially "commercial," rather than non-commercial (see *supra*, pp. 14–17), and hence invalid.

Fashion Originators' Guild of America, Inc. v. *Federal Trade Commission*, 312 U.S. 457, 467–468; *United States* v. *National Ass'n of Real Estate Bds.*, *supra*, 339 U.S. at 489.

Application of the Sherman Act to fee-fixing by lawyers will not, as the court of appeals feared, necessarily undermine admission standards and other ethical criteria that might have some restraining effect on competition. Unlike price-fixing, which is illegal *per se* because of its almost uniformly pernicious effects, most other restraints of competition are subject to the rule of reason, which calls for balancing the various harms and benefits resulting to the public by the conduct in question. See *Standard Oil Co.* v. *United States*, 221 U.S. 1, 61–68; *Northern Pac. Ry.* v. *United States*, *supra*, 356 U.S. at 4–5; *United States* v. *Topco Assocs., Inc.*, *supra*, 405 U.S. at 606–607. The impact of the Sherman Act on such other professional standards is not before the Court in this case, and cannot effectively be considered in the abstract. We note only that invalidation of minimum fee schedules is not inconsistent with a ruling that the Sherman Act permits the collective adoption and enforcement of standards concerning essentially noncommercial professional conduct that are no more restrictive than necessary to assure the public a satisfactory level of professional service. Cf. *United States* v. *Oregon State Medical Soc'y*, 343 U.S. 326, 336; *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 357.

The decision of the court of appeals in this case "actually forges a new exemption to the Sherman Act." *United States* v. *Oregon State Bar*, No. 74–362

(D. Ore.), decided November 22, 1974 (Pet. Br. App., B–18). In *Oregon State Bar*, the district court denied the state bar association's motion to dismiss an antitrust action by the United States challenging minimum fixed fee schedules as violating Section 1 of the Sherman Act. In declining to follow the court of appeals' decision here, the district court noted (*id.* at B19):

> There are indeed many factors which might convince a lawmaking body that the legal profession should not be subject to all the rigor of the Sherman Act. However, the creation of exemptions to the Sherman Act is the province of Congress, not the courts. * * * It is not for this court to create a new exemption to the Sherman Act for so-called "learned professions."

Additional reasons why any Sherman Act exemption for lawyers should be made by Congress, not by the courts, were recently indicated by the district court in *United States* v. *National Soc'y of Professional Eng'rs* Civ. No. 2412–72 (D.D.C.), decided December 19, 1974. In rejecting a claim that the Sherman Act exempted limitations on competitive bidding imposed by an association of ~~engineering firms~~ engineers upon its members, the court stated (App., *infra*, 8a):

> The issue of whether a profession is a learned one is not seen by the Court as the appropriate approach for resolving the higher question of whether the Sherman Act is applicable to that profession. To engage in such an inquiry would chart the Court on a semantic adventure of questionable value. It would be a dangerous form of elitism, indeed, to dole out exemptions

> to our antitrust laws merely on the basis of the educational level needed to practice a given profession, or for that matter, the impact which the profession has on society's health and welfare.

Lawyers provide services that are often also available from other sources, such as real estate brokers and title companies. If the Sherman Act prohibits such alternative sources from fixing the prices of such services (see, *e.g., United States* v. *National Ass'n of Real Estate Bds., supra*), then surely it prohibits such price-fixing by lawyers, absent a clear expression of Congressional intention to exempt one group but not the other. In any event, "if exceptions [for 'learned professions'] are to be written into the Act, they must come from the Congress, not this Court" (*United States* v. *South-Eastern Underwriters, Ass'n,* 322 U.S. 533, 561), because, "to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required." *United States* v. *Topco Assocs., Inc., supra,* 405 U.S. at 612.[23]

[23] The Court has found an implied exception to the Sherman Act for activities that may incidentally restrain commerce where other legislation has expressed a Congressional policy to exempt certain actions undertaken by a group primarily for purposes other than to restrain trade or commerce. *E.g., Apex Hosiery Co.* v. *Leader,* 310 U.S. 469; *United Mine Workers* v. *Pennington,* 381 U.S. 657, 661–669. It has also based an implied exception upon the need to accommodate constitutionally-protected rights to petition for redress of grievances or to engage in other types of political action. *E.g., Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127; *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 379–380. No such basis exists, however, for an exemption of commercial restraints by members of "learned professions."

III. THE MINIMUM FIXED FEE SCHEDULE RESTRAINS INTERSTATE COMMERCE

In holding that the Association's minimum fee schedule does not restrain interstate commerce, the court of appeals relied upon an unjustifiably narrow view of the scope of commerce covered by the Sherman Act, and erred in concluding that the record in this case did not establish the requisite interstate nexus.

A. LOCALLY-ORIENTED RESTRAINTS ARE PROHIBITED BY THE SHERMAN ACT IF, VIEWED EITHER IN ISOLATION OR AS PART OF A GENERAL PRACTICE, THEY MAY SIGNIFICANTLY AFFECT INTERSTATE COMMERCE

The Sherman Act's prohibition of "[e]very contract, combination * * * or conspiracy, in restraint of trade or commerce" extends to the full reach of Congress' power to regulate interstate and foreign commerce. *E.g., Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 495; *United States* v. *Frankfort Distilleries, Inc.,* 324 U.S. 293, 298. The Sherman Act applies both to activities occurring in commerce and to those substantially affecting it. *Burke* v. *Ford,* 389 U.S. 320, 321; *United States* v. *Employing Plasterers Ass'n,* 347 U.S. 186, 189.

The Act's applicability to intrastate transactions that affect interstate commerce does not depend on whether the particular activity is "local" in some sense. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 234; cf. *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 121; *Wickard* v. *Filburn,* 317 U.S. 111, 118–129; *Katzenbach* v. *McClung,* 379 U.S. 294, 301–305.

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze. [*United States* v. *Women's Sportswear Mfrs. Ass'n,* 336 U.S. 460, 464.]

The Court recently quoted *Women's Sportswear* with approval in *Gulf Oil Corp.* v. *Copp Paving Co.,* No. 73–1012, decided December 17, 1974, slip op. 8.

B. THE RESTRAINTS CHALLENGED IN THIS CASE SUBSTANTIALLY AFFECT INTERSTATE COMMERCE

The district court's findings of fact show that the application of minimum fixed fee schedules to real estate transactions in northern Virginia substantially affects interstate commerce.

The court found that "a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia" (Pet. App. A–4), and that almost half of the deeds of trust of under $100,000 that identify the location of the mortgagee, as sampled in the Office of the Recorder of Deeds for Fairfax County, showed the mortgagee to be located outside the state (*id.* at A–7). Almost all the lenders making mortgage loans require title insurance and a title examination (*id.* at A–4). The court also found that a substantial percentage of Fairfax County residents work outside of Virginia and that a significant volume of loans on Fairfax

County real estate is guaranteed by government agencies headquartered in the District of Columbia (*ibid.*), and that more than 31 percent of the persons who lived in Fairfax County in 1970 had lived outside of Virginia in 1965 (*id.* at A–7).

On these facts, the district court found the Association's minimum fixed fee schedules for title examinations and for the preparation of title insurance papers by attorneys in Virginia substantially affect interstate commerce (*id.* at A–4).

The court of appeals did not disturb these findings. Instead, it rejected the ultimate conclusion that the challenged fee schedules directly and substantially affect interstate commerce. This ruling, as noted (see pp. 21–22, *supra*), rested on theories of the limited scope of the commerce power no longer current, and the mistaken view that use of an attorney's services affects commerce only incidentally because the interstate aspects of real estate transactions in Fairfax County are merely "a fortuitous circumstance" (Pet. App. at B–18).

This unrealistic characterization ignores the clear pattern and heavy volume of interstate transactions shown in the record and found by the district court. No out-of-state lender will finance a real estate transaction without the safeguards that are available in Virginia only through the services of an attorney. Those services are not incidental, but they are indispensable to interstate financing of real estate transactions in Virginia, to the purchase of housing by new

State Bar's activities in proposing and enforcing the minimum fee schedules.

Parker v. *Brown* was a suit by a producer and packer of raisins seeking to enjoin the California Director of Agriculture from enforcing an agricultural proration program imposing price and other limitations on the sale of raisins, established pursuant to state legislation specifically providing for such programs. The plaintiff claimed that the state program was preempted by the Sherman Act and the Agricultural Marketing Agreement Act, 50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*, and that it impermissibly burdened interstate commerce in violation of the Commerce Clause.

Participation in these programs was mandatory, and the statute provided criminal penalties for noncompliance. Further, even though organization of a prorate marketing plan was first proposed by private parties (*i.e.*, the producers), and although the producers had to approve the prorate program by referendum, the State Agricultural Prorate Advisory Commission had the final authority to revise, modify, reject, or approve proration programs. This Commission consisted of the California Director of Agriculture and eight other members (including one consumer representative) appointed by the Governor with the consent of the State Senate. The Commission was to exercise final authority only after holding a public hearing and finding that the program would carry out the objectives of the legislation. Thus, the Commission *possessed and exercised* full control over the establishment of proration programs. *Id.* at 352. That

Virginia residents, and to government financing of real estate transactions there.[24]

IV. THE ACTIONS OF THE STATE BAR IN PROPOSING AND ENFORCING THE CHALLENGED MINIMUM FEE SCHEDULE ARE NOT EXEMPT FROM THE SHERMAN ACT AS INVOLVING "STATE ACTION"[25]

The court of appeals concluded that the actions of the State Bar in proposing minimum fixed fee schedules and threatening to enforce them were within the implied exemption from the Sherman Act for "state action" recognized in *Parker* v. *Brown, supra,* 317 U.S. at 350–352 (Pet. App. B–4—B–12). Under that doctrine, restraints of trade do not violate the Sherman Act where they (1) derive their "authority and * * * efficacy from the legislative command of the state" (317 U.S. at 350), (2) consist of activities of "a state or its officers or agents * * * directed by its legislature" (*id.* at 350–351), and (3) are adopted, approved and enforced by the state or a state agency, acting as such. *Id.* at 352. We submit that this doctrine does not exempt from the Sherman Act the

[24] It cannot seriously be suggested that lawyers are necessarily beyond the coverage of other acts of Congress regulating commerce (*e.g.*, 29 U.S.C. 141, *et seq.* (labor-management relations); 29 U.S.C. 201, *et seq.* (fair labor standards); 29 U.S.C. 651, *et seq.* (occupational safety and health); 42 U.S.C. 2000e, *et seq.* (equal employment opportunities)). Respondents have not suggested, nor did the court of appeals hold, that the practice of law is exempt from the Sherman Act because it is beyond the power of Congress to regulate.

[25] While we specifically address only the question whether the court of appeals erred in holding the State Bar's actions exempt under *Parker* v. *Brown*, we believe that the Association's claim of such an exemption is invalid *a fortiori*.

the *state* was the ultimate source of these programs was clear.

As this Court pointed out, a declared purpose of the statutory scheme was "to 'conserve the agricultural wealth of the State' " by raising and maintaining prices. *Id.* at 346. Thus, the California legislature had in a clear and specific manner established a basic state policy against free price competition in the marketing of raisins and had commanded state officials and private parties to carry out this policy under penalty of law.

This Court did not decide whether the Sherman Act preempted the state program, because it concluded that the Act was inapplicable. The Court held that the program was so specifically mandated by the state as to constitute "state action," *i.e.*, an act of government, to which the Sherman Act was not intended by Congress to apply. *Id.* at 350–352. Assuming that the prorate program would violate the Sherman Act if organized and effected by virtue of a contract, combination or conspiracy of private persons, the Court held that, because the program "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command" (*id.* at 350), it was *in fact* that action of the State of California and hence not subject to the Sherman Act.

The Court repeatedly emphasized that the antitrust exemption it found was limited to official action of a state's officers or agents which is directed, commanded or imposed by the state legislature or by a

duly authorized arm of the state (*id.* at 351–352; emphasis supplied):

> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action *directed* by a state. * * *
>
> * * * * * *
>
> * * * Here the state *command* to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act * * *.
>
> The state * * * *imposed* the restraint as an act of government which the Sherman Act did not undertake to prohibit.

The State Bar's activities in connection with the minimum fee schedule did not constitute the direction, command or imposition of the program by the State of Virginia or its officials. Under Virginia law, the State Bar is an association "composed of the attorneys-at-law of this State * * *." Va. Code 54–49. Governed by rules promulgated by the Supreme Court of Virginia,[25] the State Bar is "to act as an administrative agency of the Court for the purpose of investigating and reporting violations" of rules adopted by the Court pertaining to the practice of law. *Ibid.* The Supreme Court is authorized to require that all persons practicing law in Virginia be members of

[25] Prior to 1974, the state court was known as the Supreme Court of Appeals, but we shall refer to it by its current name.

the State Bar in good standing (*ibid.*), and it has done so. Article IV, Part Six, Va. Sup. Ct. R., 205 Va. 1033, as amended, 210 Va. 411.

Only active practitioners, the vast majority of whom practice privately (see p. 13, *supra*, n. 9), may serve as officers of the State Bar. 205 Va. 1011, 1033. It is controlled by a Council consisting of attorneys elected from the state's judicial circuits plus six judicially-appointed members and the President, the immediate Past-President and President Elect (Pet. App. B–11, n. 31). The State Bar derives funds from fees collected from member attorneys, which are deposited in a State Bar Fund in the State Treasury, earmarked for use only by the State Bar, and disbursed on vouchers from officers of the State Bar. Va. Code 54–52. The Council has power "[t]o make allocations of funds within the amounts available." Rule 9(g), 205 Va. 1038.

Thus, the State Bar is essentially a self-regulating organization of private persons operating under the aegis of state law and general rules established by the Supreme Court. It serves as the Court's administrative agency, to investigate and report upon violations of the rules adopted for governance of the Bar. The Supreme Court has issued such rules, but they do not establish or provide for minimum fee schedules. See Articles II and IV, Part Six, 205 Va. 1011, as amended, 210 Va. 411, 211 Va. 295.[26]

[26] Canon 12 of the Canons of Professional Ethics promulgated by the Supreme Court of Virginia, 205 Va. 1012, referred to "the customary charges of the Bar for similar services" as one of six factors that could properly be considered in fixing the fee. *Id.* at 1015–1016. However, it also emphasized that "[n]o one of these considerations in itself is controlling." *Id.* at 1016. "Customary charges" therefore appears to refer to the generally prevailing price level for the service, rather than to fixed fees as such.

Effective January 1, 1971, the Supreme Court repealed the previous Canons of Professional Ethics and replaced them with the Code of Professional Responsibility promulgated by the American Bar Association. 211 Va. 295. Ethical Consideration 2–18 and Disciplinary Rule 2–106(B)(3) provide, respectively, that suggested fee schedules and "customary charges" in the community offer some guidance as to reasonable fees. *Id.* at 302, 313. The State Bar, however, has since declined to follow the ruling of the American Bar Association that even habitual failure to follow a minimum fee schedule is itself not misconduct (see p. 3, *supra*, n. 4), and has reaffirmed its view that such conduct is unethical (A. 47–48).

The State Bar was involved in the promulgation and enforcement of the Association's fixed fee schedules challenged here, and the parties have stipulated that the Supreme Court has declared "that suggested fee schedules and economic reports of the State Bar and of Local Bar Associations involve questions of ethics within the [authority of]" the State Bar and the Supreme Court (Pet. App. A–19). The district court found that the State Bar has issued opinions (A. 45–48) that in effect declare unethical the practice of habitually charging fees below those suggested in a minimum fee schedule (Pet. App. A–5). Moreover, the State Bar distributed minimum fee schedule reports which became the basis for the minimum fee schedules published by local bar associations in Virginia, including the Association (*id.* at A–18).

The fact that the Supreme Court has declared that suggested fee schedules and economic reports involve questions of ethics does not establish that the schedules are "state action." Under *Parker* v. *Brown* the

question is whether the state has authorized and required such schedules, not whether it had sanctioned regulation of their use. See *United States* v. *Oregon State Bar, supra* (Pet. Br. App. B9–B13); cf. *In re Estate of Freeman,* discussed at p. 17, *supra,* n. 13.

The fee schedules here were not required by any legislative command of the state,[27] and were not adopted, specifically approved, or directly enforced by the Supreme Court, the only arguably relevant state agency.[28] The court of appeals held dispositive the fact that the state court has a general statutory duty to supervise the State Bar in prescribing and enforcing the court's code of ethics for attorneys. The "state action" exemption, however, does not arise from the mere fact that economic activity is regulated by the state, even when that regulation is extensive and detailed.

As this Court recently stated in a different context, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.,*

[27] The court of appeals characterized certain stipulations as asserting that the regulatory program of the State Bar had "received its authority and efficacy from legislative command" (Pet. Br. App. B–12), but it is evident from the underlying stipulations (Pet. App. A–17—A–19) that the court of appeals' conclusory description of the stipulations goes beyond their actual scope.

[28] As the court of appeals correctly recognized (Pet. App. B–11), the State Bar itself, consisting of those subject to regulation, has insufficient independence to be regarded as a state agency under the "state action" doctrine. See *Asheville Tobacco Bd. of Trade, Inc.* v. *Federal Trade Commission,* 263 F. 2d 502, 508–510 (C.A. 4); cf. *Gibson* v. *Berryhill,* 411 U.S. 564, 578–579.

No. 73–5845, decided December 23, 1974, slip op. 6. This test, invoked to determine state action for purposes of the Fourteenth Amendment, is not without relevance here.

The theory of the state action limitation of *Parker* v. *Brown* is that Congress did not intend the Sherman Act to reach action taken by the states in their sovereign capacity. Whether particular conduct constitutes "state action" for this purpose, however, turns on whether the state has affirmatively required the conduct. See, *e.g., Asheville Tobacco Bd. of Trade, Inc.* v. *Federal Trade Commission,* 263 F. 2d 502, 508–510 (C.A. 4); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.,* 424 F. 2d 25 (C.A. 1), certiorari denied, 400 U.S. 850; *New Mexico* v. *American Petrofina, Inc.,* 501 F. 2d 363, 369–370 (C.A. 9). The question is "whether the anti-competitive result actually is a goal of the state entitled to the state's immunity rather than a private group masquerading under the banner of 'state action.'" *Id.* at 369.

Here, the state was not involved to the extent of making the anticompetitive conduct a mandatory requirement. The court of appeals recognized that the Supreme Court has not specifically approved or disapproved the schedules in question (Pet. App. B–11), but found sufficient active supervision by that court to satisfy *Parker* under the rationale of its earlier interpretation of *Parker* in *Washington Gas Light Co.* v. *Virginia Elec. & Power Co.,* 438 F. 2d 248 (C.A. 4). In that case the court of appeals held that a regulatory agency's failure to disapprove acts by those regulated supports an inference that "silence

means consent" and hence establishes the state involvement required by *Parker*. *Id.* at 252. We submit that this analysis, which the Fifth Circuit [29] and the court in *Oregon Bar* refused to follow (Pet. Br. App. B-12), is unsound.

There is a sharp distinction between regulatory authority that permits, or fails to prohibit, particular restraints on competition, and state action requiring particular conduct. Cf. *United States* v. *Borden Co.*, 308 U.S. 188, 198–201. This distinction is highlighted in the Court's recent holding that a utility (like that involved in *Washington Gas Light*) was not engaged in "state action" when it terminated service to a nonpaying customer (*Jackson* v. *Metropolitan Edison Co.*, *supra*, slip op. at 12; emphasis supplied):

> The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, *where the Commission has not put its own weight on the side of the proposed practice by ordering it*, does not transmute a practice initiated by the utility and approved by the Commission into "state action."

Similarly, this Court has long held that conduct merely authorized, but not commanded, by a regulatory statute is not exempt from the antitrust laws.

[29] See *Gas Light Co.* v. *Georgia Power Co.*, 440 F. 2d 1135, 1139–1140 (C.A. 5), certiorari denied, 404 U.S. 1062.

United States v. *Radio Corp. of America*, 358 U.S. 334, 350–351; *California* v. *Federal Power Commission*, *supra*, 369 U.S. at 485; *United States* v. *Philadelphia Nat'l Bank*, *supra*, 374 U.S. at 352; *Otter Tail Power Co.* v. *United States*, *supra*, 410 U.S. at 373–375.) This distinction is made clear by *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690. There the Court rejected a private party's claim that its status as exclusive purchasing agent for the Canadian government brought it within the exemption of *Parker* v. *Brown*, because there was no indication that any Canadian government official had "directed" the defendant to engage in the anticompetitive conduct (*id.* at 706) or that Canadian law "compelled" such conduct. *Id.* at 707.

Numerous enterprises in the American economy are closely regulated because they involve essential services affected with a public interest. But this does not transmute them into "state actors in all their actions." *Jackson* v. *Metropolitan Edison Co.*, *supra*, slip op. at 8. "Doctors, optometrists, lawyers, Metropolitan [Edison] and * * * [a] grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State." *Id.* at 8–9. Thus, the Fourth Circuit has erred in assuming that under *Parker v. Brown* the existence of a general scheme of state regulation, of itself, exempts all supervised activity from the Sherman Act.[30]

[30] Moreover, even a general statutory scheme by which competitors regulate themselves is subject to the principle that

There is no evidence here that minimum fixed fee schedules were required either by the Virginia legislature or the Supreme Court. Because the Supreme Court is not a regulatory agency, its supervisory duty has been confined to the decision of individual cases and to the implementation of the broad guidelines established by the Virginia legislature. Those guidelines specifically require that, in its oversight of the bar, the court not adopt rules "inconsistent with any statute * * *." Va. Code 54-51. The court of appeals' reasoning misconceives the role of the Supreme Court and fails to recognize that the existence of some degree of governmental oversight or involvement does not itself make *Parker* applicable. See *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc., supra,* 424 F. 2d at 30; *Hecht* v. *Pro-Football, Inc.,* 444 F. 2d 931, 935 (C.A.D.C.); *United States* v. *Pacific S.W. Airlines,* 358 F. Supp. 1224 (C.D. Cal.)

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collective restraints imposed thereunder are not exempt from the antitrust laws unless they are essential to achievement of the objectives of the statutory scheme, and are no more restrictive than necessary. *Silver* v. *New York Stock Exch., supra,* 373 U.S. at 361. This principle is not properly applicable to determine whether a case involves state action under *Parker* v. *Brown.* It has been invoked, however, to determine whether state and federal law may be reconciled, without one or the other being completely ousted. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117, 127. No question of irreconcilable conflict between state law and the Sherman Act was decided in *Parker,* nor is it presented with respect to the Virginia regulatory plan for lawyers. If it were, we submit that, under the test of *Silver* and *Merrill Lynch,* collective price fixing under such a statutory scheme is neither essential for regulation of the bar (see supra, pp. 15–20), nor the least restrictive alternative for prevention of abuses in fee determination.

That the State Bar functions as an administrative agency of the Virginia court for the purpose of enforcing the court's rules for governance of the Bar does not convert every action the State Bar takes into a command of the court. No court rule requires it to propose or enforce local minimum fixed fee schedules. Its members, on the other hand, are directly and personally interested in fee levels. The State Bar exercised a private initiative, not required by statute or court rule, when it proposed schedules and determined that habitual failure to adhere to them would constitute unethical conduct.

A similar conclusion was reached in *United States* v. *Oregon State Bar, supra.* An Oregon statute declared the state bar to be an agency of the state for the purpose of carrying out the provisions of the state integrated bar law, and also to be "a public corporation and an instrumentality of the Judicial Department" of the state's government (Pet. Br. App. B2). After finding that the Oregon bar was composed of private attorneys, that no state statute authorized fixed fee schedules, and that the schedules were not the product of a disinterested state agency, the district court held that "the substantial state direction and involvement required to meet the legislative mandate requirements [of *Parker*] and to elevate these Oregon State Bar activities to the plateau of 'state action' immunity" were lacking (*id.* at B9). The same reasoning applies here.

A different, and more difficult,[31] case might be presented if the Supreme Court or some other independent public agency of the state, acting under explicit statutory authorization, required attorneys to adhere to fixed fee schedules.[32] But since the fee schedules

[31] On this record, the Court need not consider the extent to which a state requirement for price fixing among lawyers might be inconsistent with the Sherman Act. In *Parker* the Court stated that "[a] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful" (317 U.S. at 351), and that a state cannot become a "participant in a private agreement or combination by others for restraints of trade." *Id.* at 351–352. Citing *Parker*, the Court has also observed that "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 389.

[32] For example, in the early history of this country several states adopted laws directly interfering with competitive forces in the market for legal services, in that they established maximum levels for fees. See II Chroust, *supra*, at 232–277.

Similarly, under the statute governing English solicitors, minimum remuneration for "no-contentious" business (business for which a tribunal cannot tax solicitors' fees as costs), is regulated by orders issued under the Solicitors' Act, 1957, as amended, 5 & 6 Eliz. 2, ch. 27, Sec. 56. These orders are made not by a private organization but by a committee consisting of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Law Society (the English equivalent of a bar association), the president of a provincial law society, and, so far as concerns business relating to land registry, the Chief Land Registrar. Moreover, the orders are statutory instruments that can be annulled by either house of Parliament, 36 Halsbury's *Laws of England*, Solicitors ¶ 142, p. 107 (3d. ed. 1961). Litigated business is subject to taxation of costs having regard to skill, labor, and responsibility, except where there is an agreement of the parties. Such agreements do not affect rights or remedies for recovery of costs payable by any person other than the client, and agreements for excessive

were not authorized by any state statute, were not required by the Supreme Court, and were not promulgated by an independent and disinterested state body, and since the public had no voice in their establishment, the elements for immunity defined in *Parker* are absent. Because, as in the *Oregon Bar* case, *supra,* the minimum fixed fee schedules were not a product of a valid command of the state and were not established by independent state officials, *Parker* is inapplicable.[33]

amounts may be referred by the costs taxing officer to the tribunal, which can reduce the amounts. *Id.* at 122–129.

A barrister's fees are fixed by his clerk through negotiation with his instructing solicitor. Kiralfy, *The English Legal System* 288 (5th ed. 1973). English barristers are now regulated by a General Council of the Bar, consisting of the Attorney General, the Solicitor General, the chairman of the Council and elected barristers. A rule setting an absolute minimum fee for Queen's Counsel and juniors, respectively, was abrogated in 1967. 3 Halsbury's *Laws of England*, Barristers, ¶ 54, p. 40, n. *l.* (3d ed. 1953, 1972 Supp.).

[33] In view of this Court's denial of the State Bar's motion to dismiss, we do not address in detail the State Bar's contention concerning the Eleventh Amendment. Since the State Bar is not the *alter ego* of the State of Virginia, nor a state agency in any relevant sense (see p. 40, *supra*, n. 28), a judgment—even for money damages—against the State Bar, which has its own funds (see p. 38, *supra*), would not be equivalent to a judgment against the state. Accordingly, the Eleventh Amendment does not immunize the State Bar from a suit against it in the federal courts. See generally *Edelman* v. *Jordan*, 415 U.S. 651, 668–671. To hold that under the Eleventh Amendment the State Bar is immune from suit in federal court would in effect be to hold it immune from liability for violations of the antitrust laws, for suits to enforce those laws may be brought only in federal courts. See 15 U.S.C. 4, 15.

The district court having severed the questions of liability and damages, neither court below has definitively ruled on

Paraphrasing *Metropolitan Edison,* even if lawyers in Virginia could be regarded as being "heavily regulated * * *, enjoying at least a partial monopoly" in the providing of legal services within the state, and if a state agency had found their challenged actions to be "permissible under state law," that would not sufficiently connect the state with those actions as to make them attributable to the state for purposes of the Sherman Act. Slip op. at 13.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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whether or to what extent either respondent might be liable in damages to the petitioners or to other members of the class they represent. It is therefore premature for this Court to consider issues relating to damages, such as whether a nonretroactive imposition of liability would be warranted. Compare *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105–109; *Simpson* v. *Union Oil Co.*, 396 U.S. 13, 14. The pendency of the damage claims, however, coupled with petitioners' request for a declaratory judgment, means that, even if injunctive relief is no longer required against either the Association (because it has now withdrawn the challenged schedule) or the State Bar (*e.g.*, because of immunity), the case is not moot. Cf. *Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115.

APPENDIX

[Filed Dec. 19, 1974, James F. Davey, Clerk]

United States District Court for the District of Columbia

Civil Action No. 2412–72

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, DEFENDANT

Opinion

This is an antitrust suit brought by the United States against the National Society of Professional Engineers (NSPE) under § 1 of the Sherman Act, 15 U.S.C. § 1, which declares illegal every "contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States. * * *" The alleged offense centers on Section 11(c) of defendant's Code of Ethics which prohibits members of NSPE from submitting competitive bids for their engineering services.[1] Plaintiff seeks to enjoin the combination and conspiracy which maintains the prohibition against competitive bidding as well as to have canceled all provisions to the Code of Ethics and other relevant rules or statements of policy which support the bidding ban.

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[1] Section 11(c) provides:

"Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or

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NSPE is a professional society incorporated under the laws of South Carolina with more than 69,000 members located throughout the United States. Membership in NSPE accounts for slightly less than 10 percent of all graduate engineers in the nation holding a collegiate degree in engineering from an institution of higher learning. Upon a demonstration of proficiency, each of the states permits engineers to hold a certificate of registration or license to practice. Approximately 325,000 are so registered of whom 55,000 or 17 percent, are members of NSPE. About half of the registered professional engineers in this country are engaged in offering services to the public as consulting engineers. Although NSPE is a national organization, it is affiliated with professional engineering societies in each of the 50 states, territories and the District of Columbia. When a member joins NSPE,

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advancement or professional engagements by competitive bidding * * *

"c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professionals."

he joins the applicable state society and local chapter at the same time.

Defendant's Board of Directors adopted the present format of the NSPE Code of Ethics in 1964. Section 11(c) of the Code provides that an engineer "shall not solicit or submit engineering proposals on the basis of competitive bidding." The section defines competitive bidding as any measure of compensation "whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer * * * has been selected for negotiations." While Sec. 11(c) advises that disclosure of a recommended state society fee schedule does not constitute competitive bidding, it requires that the engineer "withdraw from consideration for the proposed work" if the prospective client insists on competitive bidding.

In practice, adherence to Sec. 11(c) by the engineer and client means the prospective client will limit his initial search to the engineer whose background and reputation suggests he is the best qualified and most appropriate for the client's needs. Discussion of fees, however, will not be permitted until after the client has actually selected an engineer and discussed the scope of his particular problem. Should the engineer and client be unable to agree upon a satisfactory fee arrangement, the client will withdraw his selection and approach a new engineer. This procedure is known as the traditional method of retaining professional engineering services.

In addition to the Code of Ethics, the defendant has sought to promote its ban on competitive bidding by a variety of other means. These include publication of professional policy statements, issuance of opinions on a case analysis basis by its Board of Ethical Review, distribution of pamphlets to members and clients, personal letters to individual clients suspected of

soliciting on a competitive bid basis, and participation with other professional societies in preventing governmental agencies from obtaining price proposals for architect-engineering (A–E) projects by competitive bidding methods.

While NSPE has no authority to terminate an engineer's membership in his state society for unethical conduct, it has played a significant role in coordinating and encouraging state society investigations into suspected misconduct. NSPE has recommended procedures to be followed by state societies upon the filing of charges of unethical conduct against a member, assisted in the conduct of these investigations, and directly warned members of apparent Sec. 11(c) violations.

The policing actions of defendant with respect to Sec. 11(c) have met with apparent success. The record is devoid of any evidence suggesting significant defections by members from the bidding ban. Attempts by at least one federal agency to exchange the traditional method of procuring A–E services for competitive bidding met strong resistance resulting in part from actions of NSPE urging its members to refuse to offer their services.

The nature of engineering services provided by NSPE members covers a wide spectrum embracing the study, design and construction of real property improvements located throughout the United States and abroad. Engineering services include pre-feasibility studies, feasibility studies, planning, preliminary studies, the preparation of drawings, plans, designs, specifications, cost estimates, manuals, and reports, consultations, surveys, and inspections. This work is performed in connection with myriad projects ranging from highway construction, public utilities and communications facilities to commercial structures, transportation means and mining facilities. The list is virtually endless. The clients for whom NSPE members offer their services include governmental agencies at all levels, manufacturing companies, industrial companies and retailing companies operating throughout the United States.

NSPE members practice as sole practitioners, partnerships and corporations ranging upwards in size to 1500 individuals. Individual members are often licensed to perform engineering services in several states at one time. Engineering firms with which NSPE members are affiliated frequently maintain offices in states and foreign countries other than their principal places of business. Such firms perform services on a multi-state, regional or national basis.

Most design and construction projects require the services of both architects and engineers whose services are often provided by a single firm. The engineer's portion of the firm's fee normally accounts for about 5 to 6 percent of the cost of construction. For the year 1972, the 438 largest A–E design firms accounted for approximately $2.2 billion in fees. Profit margins for many firms range as high as 10 to 12 percent. Forty, or approximately 9 percent, of the top 438 A–E design firms were publicly held corporations or affiliated with publicly held corporations, whose fees accounted for approximately 14 percent of the receipts from this group.

In addition to A–E design firms, there is a second significant group of firms performing engineering services known as design/construct firms which differ from typical consulting engineering firms in their added capability of performing construction work as well as traditional A–E design work. In 1972, 30, or

approximately 48 percent, of the top 62 design/construct firms in the nation were publicly held corporations or affiliated with such corporations and accounted for 65 percent of the $26 billion of new project contracts awarded this group.

The Government attacks defendant's ethical prohibition against competitive bidding on grounds it constitutes price fixing in *per se* violation of § 1 of the Sherman Act. Claiming that Sec. 11(c) operates to deny clients access to competitive price information, plaintiff contends the bidding ban illegally tampers with the price structure of engineering services by eliminating all forms of price competition thereby stabilizing engineering fees. NSPE proffers a three pronged defense contending first, the practice of professional engineering is not trade or commerce within the scope of § 1; second, the ethical prohibition is a reasonable practice in the field of professional engineering; third, the practice of professional engineering is exempt from antitrust attack because it is a state regulated profession. The Court will consider these defenses *seriatim*.

Defendant claims that the practice of professional engineering falls outside the ambit of trade or commerce because it is a so-called "learned profession" governed by self-regulation. The notion that learned professions are not covered by the Sherman Act has its genesis in the construction placed upon the term "restraint of trade" under § 3 of the Sherman Act by the Supreme Court in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 436 (1932). In giving expansion to the word "trade", the Court quoted with approval from now famous dictum set down by Mr. Justice Story in *The Schooner Nymph*, 1 Sumn. 516, 517–518; 18 Fed. Cas. 506, 507, No. 10,338 (1834):

> Whenever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade.

Notwithstanding this favorable reference to an early nineteenth century conception of trade, the Supreme Court has never held that a learned profession is exempt from the Sherman Act and has in fact affirmed its intention not to "intimate an opinion on the correctness of the application of the term [trade] to the professions." *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 491–2 (1950).[2] The only circuit court to declare a learned profession exemption was the Fourth Circuit in *Goldfarb* v. *Virginia State Bar*, 497 F. 2d 1 (1974). In that case, a divided court held that a legal profession's fee schedule was immune from a § 1 attack because of the applicability of the "learned profession exemption." *Id.* at 15. More recently, however, a federal district court, after giving careful consideration to the entire litany of learned profession cases, arrived at an opposite conclusion finding that the "fee schedule activities of the defendant, Oregon State Bar, are not immune to Sherman

[2] Two cases are generally cited as authority for the learned profession exemption: *Federal Baseball Club, Inc.* v. *National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), where the Supreme Court noted that "personal efforts, not related to production, is not a subject of commerce." *Id.* at 209; *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931), where the Court stated that "medical practitioners * * * are not in competition with respondent. They follow a profession not a trade. * * *" *Id.* at 653. Both references to learned professions are dicta and not considered to be a holding by the Court of the Existence of a learned profession exemption to the Sherman Act. For a discussion of these cases as precedent for a learned profession exemption, see opinion of Judge Craven (dissenting in part) in *Goldfarb* v. *Virginia State Bar*, 497 F. 2d 1, 23–24 (1974).

Act attack * * * by the 'learned profession' exemption." *United States* v. *Oregon State Bar,* Civil Action No. 74-362 (D.C. or. Nov. 22, 1974).

The concept of a learned profession exception to the antitrust laws is of dubious validity in view of the repeated reluctance of federal courts to recognize it as a legitimate exception to the Sherman Act. The issue of whether a profession is a learned one is not seen by the Court as the appropriate approach for resolving the higher question of whether the Sherman Act is applicable to that profession. To engage in such an inquiry would chart the Court on a semantic adventure of questionable value. It would be a dangerous form of elitism, indeed, to dole out exemptions to our antitrust laws merely on the basis of the educational level needed to practice a given profession, or for that matter, the impact which the profession has on society's health and welfare. Clearly, the more appropriate and fairer course is to examine the nature and conduct involved in the profession on a case by case basis together with the context in which it is practiced.

Congressional intent behind the Sherman Act focused on a desire to prevent restraints to "free competition in business and commercial transactions which tended to * * * raise prices or otherwise control the market to the detriment of purchasers of goods and services. * * *" ***Apex Hosiery Co.*** v. *Leader,* 310 U.S. 469, 493 (1940). The types of business and commercial transactions which Congress intended the Sherman Act to protect have generally been accorded broad recognition by the courts. ***United States*** v. ***National Ass'n of Real Estate Boards, supra,*** (business of real estate broker is trade within the meaning of § 3 of the Sherman Act); ***United States*** v. ***South-Eastern Underwriters Ass'n,*** 322 U.S. 533

(1944) (business of insurance not exempt from operation of the Sherman Act); *American Medical Ass'n* v. *United States,* 317 U.S. 519 (1943) (group health organization engaged in obtaining medical services for its members is conducting trade under § 3 of the Sherman Act). Each of these cases has turned on the character of the restraint and the activity restrained as opposed to a litmus test based on professionality. *Cf. Apex. Hosiery, supra,* at 485. In view of this approach taken by the courts, it can be said at the very least that where the activity of a profession so directly impacts upon interstate trade and commerce as to substantially contribute to the latter's character and direction, it must be concluded that the profession's activity has become subsumed within the general scope of § 1 of the Sherman Act regardless of whether the profession may be characterized as a learned one. As the Supreme Court noted in *South-Eastern Underwriters, supra,* with reference to the language of §§ 1 and 2 of the Sherman Act:

> Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states. 322 U.S. at 553.

The record amply demonstrates that professional engineering is not a metaphysical pursuit but rather a conduit through which abstract scientific principles are reduced to a level of practical application in response to a given problem. In this sense, professional engineering offers a service. And with respect to design engineers who prepare plans and specifications for real property improvements and articles of manufacture, professional engineering also offers a product. Unlike the lawyer's brief or the scholar's text

which convey thought, an engineer's blueprints constitute a necessary physical tool which when combined with standardized techniques of manufacturing and construction, yield a final, functional reduction to practice. In this regard, professional engineering enjoys a maximum interface with end products of construction and manufacture.

The business nature of professional engineering firms is clearly established in the record. It is an industry often organized on a local, regional, national and even international scale controlling, guiding and shaping the pace and direction of the vast array of interstate transactions needed to carry out much of the nation's construction and manufacture. Fully 50 to 80 percent of the cost of constructing and equipping construction projects is controlled by an engineer's work. A substantial amount of equipment and material is transported in interstate commerce at the specific direction of NSPE members. It would not be hyperbole to observe that professional engineering services are at the very backbone of the major portion of the nation's commerce. This is not a case of indirect and insubstantial impact by a so-called learned profession upon interstate commerce. The record is impressive in demonstrating that the imprint of professional engineering upon interstate commerce is clear and unmistakable. It is a driving force of seminal character which continues to forge the very foundation from which our commercial trade emanates. The Court is satisfied in light of the well documented record that the activities of NSPE and its members fall well within the scope of § 1 of the Sherman Act.

II

It is undisputed that price fixing is a *per se* unreasonable restraint of trade under the Sherman Act and

that in such cases it is not for the court to decide whether a particular price fixing activity serves an honorable or worthy end. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *National Ass'n of Real Estate Boards, supra* at 489; *United States* v. *South-Eastern Underwriters Ass'n, supra* at 561. Hence, if the Sec. 11(c) ban on competitive bidding acts to fix the prices of engineering services, the Court's inquiry is ended and it need not consider the reasonableness of the ethical proscription.

In order for conduct to be characterized as price-fixing, it is not necessary to show that the alleged combination or conspiracy has actually pegged prices at a particular level. *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211 (1951). It need only be established that the suspect conduct acts to restrain free price movement. It is the act of tampering with the price structure which is at the core of the offense. As the Court in *Socony-Vacuum* noted:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they * * * stabilized prices they would be directly interfering with the free play of market forces. 310 U.S. at 221.

Accordingly, where the application and practice of a code of professional ethics leaves members of a professional association genuinely free in their pricing decisions, no § 1 offense arises.

Section 11(c) prohibits defendant's members from engaging in any form of price competition when offering their services; selection is restricted to considerations of reputation and ability. No fee information may be given a prospective client which takes the

form of cost estimates or other proposals in terms of dollars, man days of work required, or percentage of construction cost which can be compared to that of another engineer. Section 11(c), however, does permit members to disclose recommended state society fee schedules to prospective clients in the course of the selection process. Moreover, Sec. 9(b) of defendant's Code of Ethics requires its members not to accept work at a fee "below the accepted standards of the profession in the area."[3] As a result of these sections, the only price information available for input into the client's selection equation is a uniformly regular fee schedule. Should the client persist in requiring competitive bids, Sec. 11(c) requires the engineer to withdraw the offer of his service altogether.

Although the actual implementation and enforcement of Sec. 11(c) is not critical to a determination of whether a combination or conspiracy exists to restrain trade, *Socony-Vacuum,* supra at 225, n. 59, the record does support a finding that NSPE and its members actively pursue a course of policing adherence to the competitive bid ban through direct and indirect communication with members and prospective clients. As note *supra,* NSPE has engaged in educational campaigns and personal admonitions to members and clients who were suspected of engaging in competitive bidding practices.

Upon careful review of the pertinent authorities, the Court is convinced that the ethical prohibition

[3] The Sherman Act offenses alleged in the Complaint do not specify activities involving the use of fee schedules by defendant and accordingly the Court does not consider their legality to be at issue in this case. The Court does believe, however, that insofar as the use of fee schedules by defendant's members might affect the impact which Sec. 11(c) has on trade and commerce, an inquiry into their promotion and enforcement by defendant is plainly relevant.

against competitive bidding is on its face a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act. It is not important to know what effect the Sec. 11(c) prohibition has on the price of professional engineering services. *Kiefer-Stewart Co.* v. *Seagram & Sons, supra* at 213. What is of critical significance is that the agreement among defendant's members to refrain from competitive bidding is an agreement to restrict the free play of market forces from determining prices to sacrifice freedom in pricing decisions to market stability. The combination becomes a *per se* illegal one under § 1 of the Act when it tends to "cripple the freedom of traders and thereby restrain[s] their ability to sell in accordance with their own judgment." *Kiefer-Stewart, Ibid.* By proscribing competitive bidding, Sec. 11(c) has as its purpose and effect the excision of price considerations from the competitive arena of engineering services. The ban narrows competition to factors based on reputation, ability, and a fixed range of uniform prices. The prospective client is thus forced to make his selection without all relevant market information. The Sec. 11(c) ban on competitive bidding is in every respect a classic example of price-fixing in violation of § 1 of the Sherman Act.

III

Action to regulate trade undertaken by state officials pursuant to state legislative command is not governed by the Sherman Act. *Parker v. Brown,* 317 U.S. 341 (1943). In *Parker,* a producer and packer of raisins challenged a California law which authorized the establishment, through state officials, of marketing programs for state produced agricultural products. The purpose of the legislation was to stabilize prices by restricting competition in order to "conserve

the agricultural wealth of the State" and "prevent economic waste in the marketing of agricultural products." *Id.* at 346. The Court in *Parker* held:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. *Id.* at 350–51.

Defendant has cited statutes in 16 states which prohibit fee bidding by engineers. It is defendant's position that because Sec. 11(c) coincides with state law, the *Parker* doctrine of state action immunity shields defendant from Sherman Act liability. The Court finds this extension of *Parker* unacceptable for several reasons.

The state program in *Parker* comprised a carefully legislated administrative plan for trade regulation which insured continuous state supervision through the offices of a state created commission. It was not a case where agricultural growers had been allowed to restrain trade in contravention of the antitrust laws by mere legislative fiat. The Court emphasized this point by noting:

> [A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. * * *" *Id.* at 351.

Likewise, the First Circuit observed in *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25, *cert. denied*, 400 U.S. 850 (1970):

> The [Parker] Court's emphasis on the extent of the state's involvement precludes the facile conclusion that action by any public official automatically confers exemption. * * * Our reading of *Parker* convinces us that valid government action confers antitrust immunity only when government determines that competition

> is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation." *Id.* at 30.

The instant Complaint charges defendant with illegal restraint of trade on a nationwide basis. It does not attack the action of any state official or agency. Unlike the situation in *Parker,* the challenged activity of NSPE and its members was a private conspiracy in restraint of trade and not conducted pursuant to the command of any state legislature. There is no evidence of any state enforcement machinery, present in *Parker,* which suggests that when the 16 states decided to prohibit competitive bidding they also intended to establish an alternate form of public regulatory control. Defendant's activities are plainly interstate in nature, unencumbered by the regulations of individual states. The extrapolation of *Parker* urged by defendant is both unfounded in logic as well as in law. The doctrine of state immunity enunciated by the Court in *Parker* simply has no applicability to a code of ethics which has been formulated outside the command and supervision of a state agency.

For the reasons stated *supra,* the Court finds that promulgation and enforcement of Sec. 11(c) by NSPE, its members and state societies, constitutes a combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of § 1 of the Sherman Act.

Findings of Fact and Conclusions of Law are annexed hereto.

JOHN LEWIS SMITH, JR.,
United States District Judge.

DECEMBER 19, 1974.

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